No. 818

IN THE

UNITED STATES

Circuit Court of Appeals

NINTH CIRCUIT

SOUTHERN DIVISION

ISSOLA RORICK,
Plaintiff in Error,

vs.

RAILWAY OFFICIALS AND EMPLOYEES ACCIDENT ASSOCIATION, A CORPORATION,
Defendant in Error.

Brief of Defendant in Error

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HOWARD SURR,
Of Counsel.

Filed this __ day of May, 1902.

Clerk.

By

Deputy Clerk.

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Ninth Circuit, Southern Division.

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BRIEF OF DEFENDANT IN ERROR.

In replying to brief of plaintiff in error in this case, we concede that *the question*, presented on this case is, whether notice given to the insurer, after the period specified in the policy here sued upon, had expired for giving such notice, is a valid notice. In other words, does the second amended complaint show, on its face, the existence of circumstances sufficient to excuse plaintiff in her failure to comply with the plain, clear and unambiguous terms of this policy, when such compliance was emphatically made a condition precedent to any recovery? In the words of counsel for plaintiff "this is

the question and the only question presented by this appeal."

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It appears from the second amended complaint that the accident, alleged to have caused the death of the insured, occurred either upon the 12th or 13th day of March, 1900; that he died on the 26th day of the same month, and that notice was sent to the defendant "within four days" after his death.

Record, p. 19.

The actual date of the mailing of the notice was the 30th day of March, 1900, and this was the date alleged in the original and also in the first amended complaint as the date of transmitting notice.

Following the well known rule that, on demurrer, a pleading must be taken most strongly against the pleader (Glyde vs. Dwyer, 83 Cal., 478; People vs. Wong Wang, 92 Cal., 281; Smith vs. Buttner, 90 Cal., 100), the second amended complaint must be taken to allege that notice was sent on the *fourth* day after the death of the insured, thus making the date of dispatching notice, to-wit: the 30th day of March, 1900, accord with the facts.

As a further answer to any question that might arise on this point, counsel for plaintiff in error, having so clearly stated in their brief (on page 9), the *one* question presented by this appeal, and having also, on their argument in the Court below, freely admitted that the said 30th day of March, 1900, was the actual date of the sending of the notice, we are justified in assuming that

plaintiff does not rely on any support for his contention, that the decision of the lower Court should be reversed, from any construction which may be put upon the allegation, contained in the second amended complaint, as to the date of sending notice, but admits the fact that no notice was sent to the defendant until after fifteen days from the date of the accident causing the death of insured, had expired.

The obtaining of a reversal of the judgment of the lower Court, based purely on such technical grounds, without at the same time deciding the real point at issue in this controversy, would, even from the point of view of the plaintiff in error, be but an unsatisfactory achievement, and might be described, like the victory of Pyrrhus of old, as a "victory worse than a defeat."

Far better never to have essayed the labor and expense of a review of the judgment in this case, by this Court, if after such review, plaintiff may still be confronted with the question whether or not notice to insurer was given in time by the plaintiff.

The demurrers to the original complaint and the first amended complaint were sustained for the same reason that the demurrer was sustained to the second amended complaint, viz: failure to show that notice has been given to the insurer within fifteen days from date of accident.

Before proceeding to examine the argument of counsel for plaintiff, it might be well to notice some of the terms of the policy, which is the foundation of this suit.

It would seem that the following extracts from this

policy, form an impregnable barrier to any attacks which plaintiff may make upon the position of the defendant in this case, and we respectfully submit, are entirely conclusive upon the question now before this Court:

"Notice of the accident causing the disability or death shall be given in writing, addressed to the association at Indianapolis, Indiana, within fifteen days from the date of the *accident*, causing the disability or death, stating the name, occupation, and address of the insured, with date and full particulars of the accident causing the disability or death, and causes thereof; and failure to give such notice within said time, shall render void all claims under this policy."

From page 13 of record.

"All the terms and conditions of this contract are *conditions precedent*."

Record, page 15.

From the above quotations from the policy, it will be seen:

First. That notice of the *accident* causing the disability or death, and not notice of the disability or death, must be given within fifteen days from the occurrence of such accident.

Second. That this giving of notice is not confined to, or must necessarily be performed by, any specified person.

Third. That the notice must give particulars of the causes of the accident, and particulars of the causes of the disability or death are not required to be given.

These three points are the main characteristics which distinguish this case, and differentiate it from the cases where circumstances somewhat similar to those existing in the case at bar have been present, but, owing to different wording of the policy in those cases, these precise features have been absent, and many such cases have been cited in brief of plaintiff in error.

Upon examination of the argument presented by our adversaries, it will be observed that they endeavor to establish, by pursuing a course of reasoning, more plausible than logical, the somewhat startling doctrine that the party to such a contract, as the policy under consideration here, is not bound to strictly follow the conditions, which he has voluntarily, while in full possession of his faculties, imposed upon himself.

The whole theory of this argument seems based upon the idea that what the insured is bound to do under such a policy is commensurate with, and is to be entirely controlled by, what the insured, or somebody else, *thinks* the result will be of any accident he may meet with. Such a conception of the proper way to interpret such a policy as this, would inevitably lead to the logical conclusion that it is absolutely useless and hopeless for any Accident Insurance Company to attempt, in any way, to bind a policy holder to give notice, within a certain time, of an injury which the insured may receive. If such be the correct construction of the notice clause of this policy, which speaks with no uncertain sound on this point, and is, we maintain, expressed in language which it would be impossible to make more lucid, or

less free from ambiguity, all insurance companies of this class are immediately placed at the mercy of every imaginable species of fraud and imposture. Upon the death of an insured person, what would prevent the assertion of a claim that death was due to an accident, happening at a date long prior to the death of the insured, and the evidence of the circumstances, causes and consequences of the accident, in such a case, it would, in nine cases out of ten, be impossible for the insurance company either to prove or gainsay.

This is only one phase of what might be encountered by endorsing the shadowy hypothesis of the plaintiff in error, and leaving the domain of clearly defined contractual obligations and rights for the murky realm of strained construction and twisted interpretation.

Once permit the winds of legal ideas to blow where they list, and depart from limits well defined and circumscribed by contract, and we are thereupon confronted with more innumerable vexatious problems than ever arose from the fabled box of Pandora.

We concede with counsel for plaintiff in error that the question under consideration "must be determined by the terms of the policy taken as a whole;" but we protest against the claim of thus construing the policy "as a whole" when one of the vital portions of the policy, viz: the clause regarding notice is either practically ignored by counsel, or its language interpreted to mean something entirely different from the plain language used by both parties to the contract.

On pages 11 and 12 of brief of plaintiff in error,

much stress is laid upon the supposition of counsel that there must be a mutuality of obligations existing between insurer and insured, in regard to this question of giving notice, and it is maintained, quite seriously apparently, that the compliance with what the respective parties to the contract have expressly agreed upon as a condition precedent to any recovery, under the policy, may be afterwards left to the dictates of the person insured.

It is not easy to see upon what this idea of the necessity of mutuality is based, or upon what foundation it can possibly rest for any legal support, or how it can be seriously suggested to have any application here.

This policy is simply a conditional offer to pay the insured or his beneficiary a certain sum of money upon his complying with its terms.

There is no violation of any contract if the insured simply fails to give notice to the insurer; he is not bound to give any notice at all, providing he does not wish to follow the terms of the policy, and in that event, of course, he forfeits all claim under the policy, but neither of the parties is bound until the insured fixes the obligation of the insurer by giving proper notice, and consequently mutuality of obligations does not arise until then, and therefore, we submit, the very substance of our opponent's argument upon this point of mutuality is "merely the shadow of a dream."

The three alleged excuses for not giving notice within the time prescribed by the policy, appearing on page 12 of brief of plaintiff in error, are all based on the plain mis-

apprehension of the terms of the policy, that we have mentioned before, viz., that the time of giving notice commences to run from the date of the death or disability of the insured, and not, as the policy so clearly prescribes, from the date of the *accident* causing such death or disability.

The first case cited in brief of plaintiff in error is the case of Phillips vs. U. S. Ben. Soc., 79 N. W. Rep., 1.

A careful reading of this case will show that there is very little resemblance between that case and the one at bar.

The complaint in the case at bar alleges that the cause of the death of the insured was discovered immediately after his death, which occurred within the period specified for giving notice of accident; yet, in spite of this fact, no notice was given to the defendant until some time after the fifteen days allowed for giving notice had passed.

There is no mistake of any physician alleged here, regarding the cause of *death*, the allegation regarding the mistake of Daniel Rorick's physician being limited to the cause of the sickness of the insured.

It is also noticable in the Phillips case that the duty of the insured to give notice arose merely from a by-law of the Insurance Society, and the obligation was not so stringent as the requirement of the notice demanded in the case at law, where the stipulation was inserted in the policy itself, and emphatically made a condition precedent to any recovery under the policy.

The next case cited in brief of plaintiff in error is

Odd Fellows' Frat. Acc. Assn. vs. Earl, 70 Fed. Rep., 16. The provisions for giving notice in this case were as follows:

"Written notice shall be given the said association at Westfield, Mass., within ten days of the date of the accident and injury for which claim of indemnity or benefit is made, with full particulars thereof, including a statement of the time, place, and cause of the accident, *the nature of the injury*, and the full name and address of the insured and beneficiary, and unless such notice and statement is received as aforesaid, all claim to indemnity or benefit under this certificate shall be forfeited to the association."

It will be seen that this clause for giving notice contains a requirement not included in the notice clause, contained in the policy, under consideration, in the case at bar. This requirement is, that the notice given, shall include a statement of "the nature of the injury," in addition to particulars, regarding the accident causing such injury. Of course, if any injury had not occurred, it would be manifestly impossible to send notice describing the nature of it. This fact is commented on by the Court. In the case at bar simple notice of the *accident*, and the causes thereof, is required, and it is quite possible, and we contend it is the only prudent course for a holder of such a policy, to give notice to the insurer, whether from such accident either disabilty or death has resulted at the time of sending the notice or not.

For example, a case might occur where the insured met with a fall, yet might, at the time of the accident,

be quite ignorant of the nature of the injury sustained by such fall. It might not at the time, as is sometimes the case where an internal injury results, be possible to give a statement of the "nature of the injury," but the want of knowledge of the result of the accident would not prevent giving details of the accident itself.

Counsel for plaintiff in error seem to lay great emphasis upon the words that the accident of which notice is to be given, in the case at bar, is the accident "causing the disability or death," and argue from these words that disability or death must have resulted within fifteen days before notice need be sent. This theory might be tenable if the clause in question was "notice of the accident, causing the disability of death *within fifteen days* shall be given, etc.," but there is no such qualification existing here in the policy, and regardless of this view of the question, as the accident the insured met with is alleged to have occured *between* the 11th and 14th of March, 1900, it must have either occurred on the 12th or 13th of this month, and hence, construing the allegation by the rule hereinbefore referred to, we must take it that the accident occurred on the 13th of March, and, as his death occurred on March 26th, the case at bar falls within the class mentioned in the opinion of the Odd F. F. A. Association case, *supra*, when the court says:

"The notice here called for is plainly to be given when a claim for indemnity by the certificate holder, or of benefit by the beneficiary, is extant. If the incapacity, contemporaneous in origin with the date of the

accident, has resulted, or if the mutilation or death has taken place, within ten days, so that a claim for indemnity or benefit is outstanding, *the ten days' notice seems to be required.*"

This being so, it is clear that the facts which existed in the Odd F. F. A. Association case were entirely different from the state of facts present in the case at bar, and we think counsel for plaintiff in error have quoted "not wisely but too well" in making extracts from such a case. Part of the opinion quoted above (and also in brief of plaintiff in error, page 18,) directly supports our contention and shows clearly what the Circuit Court of Appeals of the Seventh Circuit consider the law to be where death occurs, as in the case at bar, within the terms specified for giving notice, as the Court distinctly says:

"If the mutilation or death has taken place within the ten days, so that a claim for indemnity or benefit is outstanding, the *ten days' notice seems to be required.*"

The next case cited by counsel for plaintiff in error, (on page 19 of brief), is that of Hoffman vs. Accident Indemnity Co., 56 Mo. Appeals, 301, and it is blandly stated that it "is directly in point," and that "the notice in that case was similar in all respects to the one at bar."

To maintain this assertion, counsel follows it by setting out the requirements of the notice clause in that case, and the suicidal nature of this step is at once apparent for the notice is plainly *felo de se*, and proves too much.

We quote from their brief, page 19:

"In the event of an accident or injury for which or from which, directly or indirectly, any claim may be made under this certificate, either for weekly indemnity or loss of limbs or loss of both eyes or for the death benefit, immediate notice shall be given in writing, signed by the member or his attending physician, or in case of death, *by the beneficiary*, addressed to the secretary of the company at Geneva, N. Y., stating the full particulars as to when, where and how it occurred, and the occupation of the member at the time, and his address, and the failure to give such immediate notice mailed within ten days of the happening of such accident, shall invalidate all claim under this certificate."

The great distinguishing characteristic between the notice clause here quoted, and that of the policy in the case at bar is that, in the former, notice of the accident causing the death, is to be given in case of death, *by the beneficiary*, within ten days of the happening of such accident.

Such a requirement is absurd on its face, as the beneficiary would not be entitled to give notice of the accident while the insured still lived, as the right of the beneficiary to give such notice only arises by virtue of, and is limited by the words, "in case of death, by the beneficiary;" so in the event of death happening after the ten days allowed for notice, had expired, the beneficiary would be, under such an unreasonable clause, unable to give notice, within the required ten days, of the occurrence of accident which caused the death, and also

would be precluded while the insured lived from giving notice.

It will be noticed that the right of giving notice of the accident causing death is not limited by the policy, in the case at bar, to any person whatever. This being the case, where is the shadow of a vestige of resemblance between the two cases? On this ground alone the feebleness of the argument that the two cases are alike is patent, and the whole contention of counsel, on this point, must fall when its fictitious foundation is seen.

This distinction, regarding the ability of a beneficiary to give notice at any time, either before or after death, under such a policy as the one which is the ground of the present controversy, seems to have been entirely lost sight of by counsel for plaintiff in error, as they repeatedly imply in their brief that plaintiff in error was not called upon to give notice of the accident until death of the insured occurred.

See page 15, brief.

The next case commented upon by the brief of plaintiff in error, is that of McFarland vs. U. S. Mut. Acc. Assn., 27 S. W. Rep., 436 (Mo.) That was a case where the insured was insured against total disability and death. The notice in the policy was as follows:

"In the event of any accidental injury for which claim may be made upon this certificate, immediate notice shall be given in writing, addressed to the secretary of this association, at New York, stating the full name, occupation, and address of the member, with full partic-

ulars of the accident and injury, and also, in case of death resulting from such injury, immediate notice shall be given in like manner, and failure to give such immediate written notices shall invalidate all claim under this certificate."

From page 21 of brief.

The insured met with an accident which produced *no disability*, but the insured subsequently died from the effects of the accident, and the Court held that though a double notice was demanded by the policy, when the injury caused both disability and death, yet in the absence of such disability, notice of death alone would be sufficient to prevent rights of the beneficiary from being forfeited. The Court said:

"In case of severe injury resulting in immediate total disablity, and which after a lapse of days or weeks, results in injury and death, the conditions which require notice to be given of both the injury and death are clearly expressed. These are made conditions precedent, and a failure to perform them in a reasonable time and manner would invalidate all claim to the indemnity. Insurance Co. vs. Kyle, 11 Mo., 289; McCullough vs. Insurance Co., 113 Mo., 606, 21 S. W., 207."

"It is evident that the association failed to provide expressly for giving notice of the injury in such a case as this, in which total disability was not caused. An accident happened which resulted in death, and created a claim for a death loss, but not for such a disability loss as is contemplated under the contract."

"To require that notice be given immediately after an accident and injury which does not result in total disability, is requiring something not contained in the contract."

The Court then goes on to construe what the word "immediately" means in the notice clause and decides that in some cases it may be held to mean "a reasonable time."

It will be seen that this case differs materially from the case at bar, as in the latter case there is no clause susceptible of such elastic interpretation. but a certain number of days are allowed within which to give notice. If it is permissible to give notice two days after such period has expired, why should it not also be held that a notice given twenty days after the expiration of the period is equally binding on the insurer. Such difference is only one of degree not of kind.

In spite of the palpable distinction existing between the McFarland case and the case at bar, counsel for plaintiff in error insist (on page 22, their brief), that the two cases are very similar.

We deny this. In the case at bar there is no question raised as in the McFarland case, as to whether the insured should have given notice of any disability which resulted from the accident he met with, and the policy here does not call for the double notice prescribed in the McFarland case.

From the first quotation, we have made from the opinion in the McFarland case, it is very plain that the Court never intended to imply that when, as in the case

at bar, the insured was injured and died *within* the period limited for giving notice, that in such event, notice need not necessarily be given in accordance with the policy's terms.

Here it appears, that David Rorick was injured on March 13th, 1900, and died on March 26th, 1900; yet no notice was sent until the 30th day of March, 1900.

The question what would have been the effect on the rights of the beneficiary had Rorick died after the expiration of the fifteen days, allowed for giving notice, does not arise here at all, and whatever view is taken upon that subject, is entirely irrelevant to the case now before this Court.

We therefore submit that, as the claim of plaintiff in error was outstanding before fifteen days from date of the accident, alleged to have caused death of insured, had passed, the McFarland case cannot be held to be in the slightest degree parallel to the case at bar and such extracts from the former case, relating to notice of disability, made by counsel for plaintiff in error, tend rather to obscure than throw light upon the present question.

The case of Trippe vs. Provident Fund Society, 23 N. Y. Sup., 175, is another case cited by plaintiff in error, and they say:

"There is no difference in principle between that case and this, although the terms of the policy are somewhat different. In both cases the policy required the notice given to include full particulars of the injury *and its results*, which could not be done in this case any more than in the other."

It would be hard to understand why this case should be cited from the point of view of the counsel for plaintiff in error, except upon the ground of the misappresion of counsel as to the kind of notice of the accident required in case at bar. In the garbled version of the sort of notice demanded here, counsel contend that the policy in case at bar "required the notice given to include full particulars of the injury and its results." (See brief, page 23.) A cursory glance at the notice clause in this policy will show that this is incorrect, as only particulars of the *accident* are required and not particulars of the resulting disability or death.

The case of Trippe vs. Provident Fund Society, *supra*, it will be observed at a glance is not analogous to the case at bar. In the former case the notice clause provided that written notice had to be given "within ten days from the date of either injury *or death.*"

The body of Trippe was buried in the debris of a building, which had fallen, and no one knew that he had been killed or injured until the body was recovered It was held very properly that upon these facts neither the occurrence of the injury or death being known, notice of either could not be given until knowledge of the event was obtained by the recovery of the body.

If David Rorick had disappeared under similar conditions, the Trippe case might be compared with considerable force to the case at bar, but where the insured, as in the case at bar, dies under no such peculiar circumstances, and dies within the time limit for giving notice, we fail to see the analogy which counsel for plaintiff in

error maintain is presented by the two cases. There is no doubt the court in the Trippe case would have decided that case very differently had such facts as exist in the case at bar existed in the former case, and we quote from the opinion in the Trippe case, on page 175 of 23rd N. Y. Sup.: "*It is no doubt settled law* that when the time within which notice of the injury or death must be given, is specified definitely, *it must be complid with or no recovory can be had.* Striking examples of this rule will be found in Gamble vs. Accident Co., 4 Ir. Com. Law, 204, and Patton vs. Corporation, 20 L. R. Ir., 93, wherein it was held that the omission to give the notice within the prescribed time, even when death was instantaneously caused by an accident, was a complete answer to any claim made on the policy. Those were cases of accidental drowning, and *are distinguishable from the present by the important feature that the fact of death was known immediately following the accident.*"

To attempt to make the distinction between the two cases clearer, after the last quotation, would be "wasteful and ridiculous excess."

The last case mentioned in brief of plaintiff in error is that of Insurance Company vs. Boykin, 12 Wall., 433, were it was held that insanity would be a valid excuse for giving notice. This is not the point at issue here, as the question in the case at bar is whether the plaintiff has forfeited *her* rights by not complying with the terms of the policy, and we are not arguing the question as to whether the insured forfeited *his* rights by being prevented from giving notice of the accident

causing his alleged disability. In the case cited it will be observed that notice required by the policy was given. If the insured in the case at bar had punctiliously carried out every obligation laid on him by the policy, this fact would not mitigate or tend in any way to excuse the failure of plaintiff to comply with conditions, the fulfillment of which might be made incumbent upon her, by the policy, before any liability of the Insurance Company would arise, and we strenuously insist that under such provisions as are contained in the policy in the case at bar,

It is imperative that notice must be given in accordance with the terms of the policy, in the absence of a waiver, or unless some superhuman cause has prevented compliance with such stipulation.

In the case of McCormack vs. N. British Ins. Co., 78 Cal., 469, the policy contained the usual condition as to making preliminary proof of loss, and provided that the amount to be paid under the policy should be paid "sixty days after the proofs shall have been made by the assured."

The learned counsel for plaintiff in error, Judge Works, wrote the opinion in that case and said:

"Where such preliminary proof is required by the policy, the assured must allege and prove that the proof has been made or that the requirement has been waived. (Doyle vs. Phoenix Ins. Co., 44 Cal., 264; May on Insurance, Sec. 465.)

There was no evidence that the necessary proof had been given, nor was it shown that such proof had been waived.

The nonsuit was therefore properly granted.

Judgment affirmed."

It is almost superfluous to remark that no waiver is alleged in the complaint in the case at bar, nor does the complaint contain any allegation of notice having been given in time.

In the case of Heywood vs. Maine Mut. Acc. Association (Maine), 27 Atlantic Rep., 154, the plaintiff sought to recover on an accident policy for injuries received. The policy contained stipulation that failure to give notice to the company within ten days of the occurrence of the accident should invalidate all claims under the policy. The case is on all fours with the case at bar, and the language of the opinion is as follows: "The policy contained a stipulation that failure to notify the company of the injury for ten days after it occurred should bar all claim therefor. It was competent for the parties to make the agreement, and they are bound by it. The plaintiff neglected to notify the company of any accident or injury to himself until twenty-six days had elapsed. A careful examination of the evidence shows no waiver on the part of the company. The authorities cited at the bar conclusively show that plaintiff cannot recover. According to stipulation of the parties, judgment for defendant."

In the case of Gamble vs. Acc. Ins. C., 4 Ir. C. L., 204, the insurance policy sued upon made it a condition

precedent to recovery that notice, together with full particulars, should be given within seven days of the death of the insured. Owing to the fact that the accident was a sudden one and produced instantaneous death, no one gave the notice required as no one was aware of the existence of the policy. The court held that a failure to give the notice required would prevent a recovery, as the failure was not due to the act of God, and the insured ought to have provided for such a contingency and informed some one of the existence of the policy.

This doctrine is indorsed by that very accurate writer Joyce in his work on Insurance. He says:

"Life policies generally require that notice and proofs of death be furnished within a certain time after the death of the insured, and stipulate forfeiture in case of noncompliance. If the policy specifies the time within which such conditions must be complied with, with the proviso that all rights under the policy shall be forfeited in case of noncompliance, *then no recovery can be had except the requirements of the policy be fulfilled*, and it is held that only an act of God will excuse."

Joyce on Insurance, Sec. 3277, citing Patton vs. Emp. etc. Association, 20 L. R. Ir., 93, and Home Ins. C. vs. Lindsay, 26 Ohio, 348.

"If the policy provides that in case of the death of the insured notice must be given to the company within a certain specified time thereafter, and makes the requirement a condition precedent to recovery, *notice must be given within the time specified*, otherwise there can be

no recovery, except there has been a waiver of the provision, or unless the act of God has prevented compliance with the provision."

Joyce on Ins , Sec 3278.

"Where the policy provides that notice must be given and proofs of loss furnished within a certain prescribed time, and that failure to comply with this provision shall constitute a bar to an action upon the policy, *the condition is a valid and binding one, and if such stipulation has neither been complied with nor waived, there can be no recovery.*"

Joyce on Ins., Sec. 3280.

See also Joyce on Ins., Sec. 3281.

The opinion in the case of West Travellers Ass'n. vs. Smith, 85 Fed., 402, which was a decision by the Circuit Court of Appeals, for the Eighth Circuit, of the United States, contains language which is precisely in point on the question presented by the case at bar.

The policy there sued on, contained the stipulation that "in the event of any accident or injury for which any claim shall be made under this certificate, *or in case of death*, resulting therefrom, immediate notice shall be given."

It will be readily seen that this clause differs widely from the clause regarding notice, in the case at bar, as the notice there exacted was *either* of the accident *or* of the death resulting therefrom. There is no such alternative provided in the policy in the case at bar, as here the "notice of the *accident* causing the disability or death shall be given."

The insured in the case of West Com. Trav. Ass'n., *supra*, failed to give the required notice of the injury which resulted in his death, but the beneficiary gave notice of the death, within a reasonable time thereafter, which, under the alternative course provided in the notice clause, was held sufficient, and the Court said: "Must she give notice of the accident on account of which her claim may rise before she knows whether or not it will ever come into existence? A provision which exacts such a notice should be plain, clear and unambiguous. * * * * * *A stipulation could have easily been drawn which would have plainly imposed upon this beneficiary the duty of giving such a notice.* If this contract had simply omitted the words, 'or in case of death resulting therefrom,' and had provided that 'in the event of any accident or injury for which any claim shall be made under this certificate, notice of such accident or injury shall be given, immediately after it happens,' there *would have been no doubt that the beneficiary was required to notify the association of the accident as soon as it occurred.* * * * If this is not the correct construction of the provision, the words 'or in case of death resulting therefrom,' are without significance or effect, because the stipulation, *without those words*, would require the beneficiary of a death loss to give notice of the accident or injury immediately after it occurred."

The case at bar is precisely the same as the hypothetical case suggested in the above opinion, as "a plain, clear and unambiguous" stipulation, was inserted in the

Rorick policy to the same effect as the clause mentioned in the above opinion, without the qualification, which proved so fatal to the insurer, contained in the policy in that case.

For other authorities regarding doctrine of construing limitations in policies, requiring the giving notice or furnishing proofs, as conditions precedent within the allotted time, see cases of:

White vs. Home Mutual Ins. Co., 128 Cal., 135.

Prudential Ins. Co. vs. Myers, 15 Ind. App., 339.

Blakely vs. Phœnix Ins. Co., 20 Wisconsin, 206 and 91 Am. Dec., 388.

Gould vs. Dwelling House Ins. Co. (Michigan), 51 N. W. Rep., 455.

McCullough vs. Phœnix Ins. Co., 113 Mo., 606, and 21 S. W. Rep., 208.

Williams vs. Pref. Mut. Acc. Ass'n., 91 Ga., 698 and 17 S. E., 982.

Trask vs. State F. & M. Ins. Co., 29 Pa., 198, and 72 Am. Dec., 622

Quinlan vs. Prov. Wash. Ins. Co., 133 N. Y., 362.

Knudson vs. Hekla Ins. Co., 75 Wis., 198, and 43 N. W. Rep., 954.

Inman vs. West F. Ins. Co., 12 Wend., 459.

Barre vs. Council Bluffs Ins. Co. (Ia.), 41 N. W. Rep., 373.

Shapiro vs. West Home Ins. Co. (Min.), 53 N. W Rep., 463.

Sergent vs. London and Liverpool & G. Ins. Co., 32 N. Y. Sup., 594.

Germ. Ins. Co. vs. Fairbank, 49 N. W. Rep., 711.
West Home Ins. Co. vs. Richardson, 58 N. W. Rep., 597.
Cawley vs. Nat'l. Emp. Assn., 1 C. & E., 597.

Though the question here does not arise in that case, we would also refer to the recent case of Northern Assurance Co. vs. Grand View Bld. Assn., decided at the October term, 1901, of the Supreme Court of the United States, when the question of construing insurance policies strictly is gone into at some length.

It is of great importance to all insurance companies that speedy notice be given to them of an accident, so that while the accident is fresh they can examine the witnesses of the occurrence, and ascertain whether they are liable or not, and fifteen days is an ample period of time within which to give such notice. On the other hand, if no notice at all is required, then within four years after the accident has occurred an action could be brought upon the policy of insurance, and the insurance company could be mulcted in heavy damages in cases where either no accident at all ever occurred, or where proof could not be available for the insurance company to defeat the action by reason of lapse of time. These policies, therefore, should be construed according to their terms, and, as the New York *Independent* in a late editorial, the date of which we have forgotten, urges, it is of great importance for the administration of insurance companies, and for the protection of honest claimants, that insurance companies should be protected from judgments unless they are liable under the terms

of their policies. Here the plaintiff thought the accident was a trivial one. She knew of it, but made a mistake as to its gravity. Such mistake does not excuse the not giving the notice required. If the fact that Mr. and Mrs. Rorick through mistake deemed the accident a trivial one, should excuse their not giving the notice, or the fact of the physicians having made a wrong diagnosis of the injury, and thereby induced them to make a mistake ; if such reasons can justify or excuse in any way the failure to give notice, then are the terms of insurance policies not the strong covenants which they should be, but mere bonds of sand.

The plaintiff admits that she knew of the accident from the time that it occurred, but attempts to excuse the not giving the notice on the grounds of her alleged belief in the trivialty of the accident, the mistaken diagnosis of the physician, and the insanity of the deceased coming on a few days before his death. The fact still remains very clearly and prominently, that she might have given the notice, if she thought it worth while so to do, within the alloted time, and even after Mr. Rorick's death, and the instrument of contract upon which she seeks recovery imperatively demands a giving of the notice as a condition precedent to any recovery. How then, can she recover unless courts refuse to be governed by the contract of insurance, which, carried out in all of its requirements will yield the best results to the honest assured?

It must be assumed that the insured entered into this contract with his eyes wide open and in full possession

of his faculties, and the language of this clause, whichever way it is taken, leaves no loophole by which it is possible to escape from the necessity of giving notice of the accident causing the death within fifteen days from the date of such accident, in the absence of impossibility of performance or waiver.

Counsel for plaintiff in error intimate in their brief that the learned judge of the Court below was swayed by conscientious scruples, against permitting any considerations of sympathy for the plaintift in error to affect his judgment, to such an extent that he has allowed such feelings to carry his determination of the question beyond the point where it can be supported by authority.

This suggestion cannot be maintained, and it is only necessary to read the opinion of the learned judge (Record, p. 27), to see how his views upon the question before this Court, harmonize with the authorities, and, we respectfully submit, that his decision, instead of manifesting the presence of any element of anti-sympathetic bias, is simply an illustration of deciding a controversy by the "dry light of reason."

The contract was voluntarily entered into by the insured, and the notice clause was entirely a reasonable one, and no element of hardship is present.

Were this not the case, it would seem very unconscionable to restrain a person of mature age, in full possession of his senses, who is a member of a community which makes the slightest claim to the enjoyment of freedom, from becoming at his own volition a party to any contract, merely because the terms of such contract

savored of hardship, and after having made such a contract, if any inconvenience or loss to either party arises therefrom, from not complying with its terms, it would not be equitable, after making all sympathetic allowances, to say that performance is excused, on these grounds alone

We have not found a single case which presented similar facts as those existing in the case at bar, (nor have counsel for plaintiff in error referred to such a case), where it was held that the insured could recover, and we respectfully submit to establish such a precedent would revolutionize the application of the law to accident insurance; and we contend that the hypothesis of counsel for plaintiff in error is altogether a too tenuous ground on which to found the right to transfer the sum of $5,000 from the possession of the defendant to the pocket of the plaintiff in error.

It is respectfully submitted that the judgment of the Court below should be affirmed.

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F. W. GREGG, AND

HOWARD SURR,

Of Counsel.